(2)

Supreme Court, U.S.
FILED
MAY 13 1996
CLERK

No. 95-1651

In The

Supreme Court of the United States

October Term, 1995

SHEARSON LEHMAN BROTHERS, INC.
F/K/A SHEARSON LEHMAN HUTTON, INC.
AND SHEARSON LEHMAN BROTHERS HOLDINGS, INC.
F/K/A SHEARSON LEHMAN HUTTON HOLDINGS, INC.,

Petitioners,

v.

HUGHES HUBBARD & REED,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT STATE OF TEXAS

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

PARKER C. FOLSE, III
Counsel of Record
SUSMAN GODFREY, L.L.P
Washington Mutual Tower
1201 Third Avenue, Suite 3120
Seattle, Washington 98101
(206) 516-3880

5100 First Interstate Bank Plaza
1000 Louisiana Street
Houston, Texas 77002
(713) 651-9366

Attorneys for Respondent Hughes Hubbard & Reed

31 pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

PRELIMINARY STATEMENT 2

REPLY TO SHEARSON'S STATEMENT OF THE CASE 5

1. The Registration Process 6
2. Hutton/Shearson's Oversales 7
3. Shearson's Misstatement of the Record 10
   (a) The Scope Of HH&R's Engagement 10
   (b) HH&R's Role In Shearson's Decision About How Many Securities To Register For Sale In Texas 12
   (c) Shearson's Failure To Amend The Registration 13

ARGUMENT 16

PRAYER 20

TABLE OF AUTHORITIES

CASES: **Page**

Austin Co. v. Pennie & Edmonds, 823 F.2d 223 (8th Cir. 1987) 17

Berkman v. D.M. Oberman Mfg. Co., 230 S.W. 838 (Tex. Civ. App.--Austin 1921, writ dism'd) ..... 3n.

Burger King v. Rudzewicz, 471 U.S. 462 (1985) 16, 20

Campbell v. Gaspar, 102 F.R.D. 159 (D. Nev. 1984) 17

Credit Lyonnais Bank Nederland, N.V. v. Manatt, Phelps, Rothenberg & Tunney, 202 Cal. App. 3d 1424, 249 Cal. Rptr. 559 (1988) 18

FDIC v. Malmo, 939 F.2d 535 (8th Cir. 1991) 17

Helicopteros Nacionales de Columbia, S.A. v. Hall, 466 U.S. 408 (1984) 16

Holliday v. Henry I. Siegel Co., 643 S.W.2d 519 (Tex. App.-Houston [14th Dist.]), *aff'd*, 663 S.W.2d 824 (Tex. 1984) ..... 3n.

Hotel Partners v. KPMG Peat Marwick, 847 S.W.2d 630 (Tex.App.--Dallas 1993, writ denied) ..... 5n.

Mayes v. Leipziger, 674 F.2d 178 (2d Cir. 1982) 17

Myers v. Emery, 697 S.W.2d 26 (Tex. App. -- Dallas 1985, no writ) 17

NLRB v. Hendricks County Rural Elec. Corp., 454 U.S. 170 (1981) 2

Rudolph v. United States, 370 U.S. 269 (1962) 2

Smith v. Morris & Manning, 647 F. Supp. 101 (S.D.N.Y. 1986) 17

Stonecipher v. Sexton, 54 F.R.D. 435 (D. Kan. 1972) 18

Page

Texas v. Mead, 465 U.S. 1041 (1984) 2

United States v. Johnston, 261 U.S. 220 (1925) 2

RULES:

Sup. Ct. R. 10 ..... 2, 3, 16, 18

Sup. Ct. R. 14 ..... 3n.

Sup. Ct. R. 15 4

OTHER AUTHORITIES:

R. Stern, *et al.*, Supreme Court Practice 189 (7th ed. 1995) 2

NO. 95-1651

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

SHEARSON LEHMAN BROTHERS, INC.
f/k/a SHEARSON LEHMAN HUTTON, INC.
and SHEARSON LEHMAN BROTHERS HOLDINGS, INC.
f/k/a SHEARSON LEHMAN HUTTON HOLDINGS, INC.

Petitioners,

v.

HUGHES HUBBARD & REED,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent Hughes Hubbard & Reed ("HH&R") respectfully submits this brief in opposition to Shearson's petition for writ of certiorari, which should be denied.

PRELIMINARY STATEMENT

Shearson seeks review of a decision by an intermediate Texas appellate court which, in Shearson's own words, applied legal standards that are "well established" and "correctly stated the relevant legal rule." Shearson's Petition for Writ of Certiorari (hereafter, "Petition") at 14.[1/] Shearson's complaint is that the Texas Court of Appeals "erred in analyzing the facts and Shearson's claims." Id. Even if Shearson's distorted recitation of the record were accurate, and it is not, this would not be a case that justifies the Court's review. Shearson's criticism of the opinion below is, classically, "fact-specific." It amounts to nothing more than a disagreement with the lower courts' analyses of the evidentiary record and the significance they attached, or declined to attach, to specific evidence. *See* Rule 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of eroneous factual findings or the misapplication of a properly stated rule of law.").

The Court's usual procedure has been to decline review when only factual questions are involved. *See Texas v. Mead*, 465 U.S. 1041, 1043 (1984) (Stevens, J., respecting denial of certiorari) ("We do not grant a certiorari to review evidence and discuss specific facts") (quoting *United States v. Johnston*, 261 U.S. 220, 227 (1925)); *NLRB v. Hendricks County Rural Elec. Corp.*, 454 U.S. 170, 176 n.8 (1981) (because cross-petition presented primarily a question of fact, writ dismissed as improvidently granted); *Rudolph v. United States*, 370 U.S. 269, 270 (1962) (per curiam) (certiorari dismissed where case involved review of facts important only to the litigants). *See also* R. Stern, *et al.*, SUPREME COURT PRACTICE 189 (7th ed. 1995). This case presents no new or novel issue of law, or any legal holding that is even claimed to be inconsistent with the precedents of this Court or any other court. The Texas Court of Appeals' decision is limited in precedential significance to its specific factual context. It did not warrant review by the Texas Supreme Court, and it does not warrant review by this Court.

---

[1] See also Petition at 10 ("The problem with this precedent is not that it misstates the relevant legal principles.").

Apart from being fact specific, the intermediate appellate decision below does not conflict with other precedent and Shearson does not argue in any respect that it does. *See* Rule 10(b). More than a dozen judges on three Texas courts have already reviewed both Shearson's arguments and the extensive record in this case, and not one has been persuaded. The trial court granted HH&R's motion to dismiss for lack of personal jurisdiction and filed detailed findings of fact and conclusions of law, which Shearson tellingly chose not to include in its Appendix to the Petition.[2]

In a detailed and carefully reasoned opinion, a three-judge court of appeals unanimously affirmed that decision in all respects. Significantly, the Texas Court of Appeals held "that the evidence was sufficient to support the findings of the trial court and the trial court did not impermissibly reach the merits of the case or err by failing to make additional findings." See Petition at 20a. Shearson sought rehearing, and that too was denied.

Shearson then sought discretionary review by the Texas Supreme Court, and that Court denied review without opinion, and without dissent. Shearson sought rehearing, and it was denied without dissent.

Shearson's Petition is a rehash of the arguments it presented at three levels of the Texas court system. It has not brought forward any new matter, and there is no reason to suspect that all of the judges in Texas who have already seen the case somehow

---

[2] Although Rule 14.1(h)(i) requires the petitioner to include in its appendix all "opinions, orders, findings of fact, and conclusions of law . . . entered in conjunction with the judgment sought to be reviewed," Shearson omitted the trial court's findings and conclusions from its Appendix. They are reprinted in the appendix to this brief in opposition.

Shearson faults the trial court for entering the findings and conclusions proposed by HH&R's counsel and declining to adopt Shearson's. Under Texas law, it is presumed that the trial court duly considered the proposed findings and conclusions as to their correctness and compatibility with the court's views of the facts and the law, and adopted them as its own. *See Berkman v. D.M. Oberman Mfg. Co.*, 230 S.W. 838, 840-841 (Tex. Civ. App.--Austin 1921, writ dism'd). *See also Holliday v. Henry I. Siegel Co.*, 643 S.W.2d 519, 520 (Tex. App.--Houston [14th Dist.] 1982), *aff'd*, 663 S.W.2d 824 (Tex. 1984).

overlooked, misunderstood or failed properly to weigh the record or the positions that Shearson is now repeating (for the fourth time) to this Court.

The reason that Shearson's arguments have been unsuccessful is that they both misapprehend relevant precedents and grossly distort the record evidence. What Shearson says about the facts in its Petition and what the evidence shows are frequently two entirely different things. In the Texas courts, HH&R was required to devote considerable space in its briefs merely to correct Shearson's misstatements about the evidence. It must do that here as well. *See* Rule 15.2.

Shearson's misstatements of the record also infect its statement of the "Questions Presented." The case does not in fact present the questions framed by Shearson -- although it would not merit review even if it did. For example, contrary to the premise of Question 1, HH&R's conduct that is the basis for Shearson's claims did not occur in the context of its representation of Shearson "before the Texas Securities Board." Contrary to the assertion in Question 2, the record does not support the view that Shearson was subjected to regulatory enforcement action because of HH&R's advice. Question 3 assumes that the trial court addressed the merits of Shearson's claims in some way beyond what was necessary to resolve the issue of personal jurisdiction, but that is belied by the record. And Question 4 posits that Shearson's claims arose from HH&R's alleged conflict of interest in representing a Texas company, but, as the Texas Court of Appeals correctly concluded, that too is a mischaracterization of the record.

Finally, the main reason given by Shearson to explain why this Court should grant the writ is that the Texas Court of Appeals' opinion restricts the ability of the Texas courts to regulate and control the conduct of non-resident lawyers who give advice about Texas law. Putting to one side whether this "policy" argument is at all relevant to the due process issues implicated by a challenge to personal jurisdiction, the argument is extraordinarily ironic. Shearson made the same pitch to the Texas Court of Appeals and to the Texas Supreme Court, utterly without success. Despite Shearson's claim that "Texas' interests are preeminent," Petition at 13, the Texas courts saw no reason to open their doors to this

malpractice suit by a New York client against lawyers in the Los Angeles office of a New York law firm based on alleged incomplete advice about the law of Texas. If the courts of Texas were not troubled by that result, neither should this Court be.

In short, this case does not present any issue of importance to the jurisprudence of this Court, and the Court's review is not necessary to resolve conflicts in the jurisprudence of any lower courts. The dispute is not about the state of the law but about this specific evidentiary record and the application of settled legal principles. And, as we discuss further below, there was no error in the result reached.

REPLY TO SHEARSON'S STATEMENT OF THE CASE

The distortions of the record in Shearson's "Statement of the Case" are far-reaching. As discussed more fully below, the material facts are: (1) that neither Shearson nor HH&R is a Texas resident; (2) that Shearson's New York and California offices retained attorneys in HH&R's Los Angeles office to perform legal work relating to the registration with the Securities and Exchange Commission and 50 states' regulators of a securities offering for which Shearson acted as sales agent; (3) that Shearson sold more securities in Texas than it had registered for sale, ignored HH&R's advice to amend its registration, failed to consult Texas securities counsel (not HH&R) who had handled prior regulatory problems in connection with the same offering, and ended up trying to shift the blame to HH&R on the ground that HH&R in Los Angeles had not informed Shearson in New York about a deadline for amending; and (4) that Shearson in New York refunded to many Texas investors what they had paid for the securities that Shearson sold, allegedly as a consequence of HH&R's omission.[3]

---

[3] Under Texas law, the appellate courts were required to give deference to the trial court's detailed findings of fact, which fully support the result in this case. See *Hotel Partners v. KPMG Peat Marwick*, 847 S.W.2d 630, 632 (Tex. App. -- Dallas 1993, writ denied):

> As the trier of fact, the trial judge may draw reasonable inferences from the evidence. We may not disregard his findings of fact on appeal if the record contains some

(Footnote continued on next page)

Shearson's malpractice claims do not arise from HH&R's employment by any Texas resident or from any legal work that HH&R performed in Texas. Those claims are predicated entirely on an alleged omission by a California attorney to provide a client in New York with complete advice about Texas law. Everything else is a smokescreen for forum-shopping.

1. The Registration Process

In December 1986, E.F. Hutton & Co., Inc. ("Hutton"), Shearson's predecessor in interest, retained the Los Angeles office of HH&R as counsel in connection with the proposed formation of a research and development limited partnership, Houston Biotech Partners, L.P. ("HBP"), to finance work to be performed by Houston Biotechnology Inc. ("HBI"), which was Hutton's investment-banking client.[4] As is customary in these sorts of deals, HH&R represented both Hutton and (after it was formed) HBP in connection with the negotiation and documentation of a series of agreements to which HBP would be a party and in connection with the registration with the Securities and Exchange Commission, and collaterally with various state securities regulators,[5] of units of limited partnership interest in HBP and related securities to be sold by Hutton to the investing public. (Kanofsky Aff. ¶¶ 3-4, at FST 21.) Contrary to Shearson's assertion that HH&R "was Hutton's sole blue sky counsel in Texas," Petition at 16, Hutton also retained a large Texas firm,

---

(..continued)

> evidence of probative value from which these inferences may be drawn, or unless the findings are so contrary to the overwhelming weight of the evidence as to be manifestly wrong.

[4] The facts set forth herein are attested to in the affidavit of Gordon R. Kanofsky ("Kanofsky Aff.") submitted below in support of HH&R's special appearance. The Kanofsky Aff. is contained in the First Supplemental Transcript ("FST"), at 20-24. Except as noted herein, Shearson did not dispute any of the facts attested to in the Kanofsky Aff.

[5] Many states simply rely on the federal registration process and do little, if any, independent review of a proposed offering. In any event, most "national" securities work is federally oriented. Where specialized state-law problems arise or are anticipated, underwriters including Shearson regularly retain local experts. Kanofsky Aff. ¶4, at FST, pp. 20-21.

Vinson & Elkins, to apply for registration of the HBP offering in Texas, using insofar as possible uniform registration materials that HH&R prepared in California.[6] (Kanofsky Aff. ¶ 4, at FST 21.)

The registration of the HBP securities became effective in July 1987 (Kanofsky Aff. ¶ 4, at FST 21) and, with respect to state registration, HH&R prepared and distributed to Hutton, among other things, a "blue sky" memorandum that summarized where and in what volume the registered securities could be sold on a state-by-state basis.[7] HH&R advised Hutton in the blue sky memorandum that "as members of The State Bar of California we do not purport to be experts in the law of any other jurisdiction." (FST 1508.)

2. Hutton/Shearson's Oversales

In late May 1988--eight months after HH&R completed the work described above and six weeks after Shearson/Hutton terminated the HBP offering--a Shearson employee in New York (Bob Lopes) provided HH&R in Los Angeles with what purported to be a state-by-state recapitulation of sales so that HH&R could undertake the ministerial task of filing post-offering sales reports with state regulators. (Kanofsky Aff. ¶¶ 5-6, at FST 21-22.) Up to that point, as was commonly the case, Hutton/Shearson had

---

[6] Hutton also regularly used Texas counsel in its dealings with Texas securities regulators with regard to regulatory violations. For example, Hutton retained a law firm in Austin that was then called Johnson & Swanson to represent it before the Texas State Securities Board in addressing and resolving the Texas regulatory problems that resulted from Hutton's illegal offering of the HBP securities prior to the registration becoming effective. Johnson & Swanson was on a list of approved local counsel that Hutton regularly used on blue sky matters. Hutton also retained another New York law firm (not HH&R) to represent it before the Securities and Exchange Commission with respect to potential federal consequences of its premature Texas offers. (Kanofsky Aff. ¶ 4, at FST 21.)

[7] A copy of the blue sky memorandum appears at FST 1507-33.

provided no state-by-state sales information to HH&R.[8] (Kanofsky Aff. ¶ 6, at FST 22.) In reviewing the sales figures in early June 1988, an HH&R paralegal noticed that Shearson/Hutton apparently had sold securities in Tennessee, Massachusetts and Arizona, where the securities had not been registered at all, and apparently had sold more securities in Texas and Indiana than had been registered for sale. (Kanofsky Aff. ¶ 7, at FST 22.) These problems existed solely as a consequence of where Shearson/Hutton had sold the securities and had nothing to do with the registration documents that HH&R had prepared in 1987. (Kanofsky Aff. ¶ 7, at FST 22-23.) That Texas happened to be one of the states in which Shearson/Hutton apparently had failed to comply with the law was purely fortuitous as far as HH&R was concerned and was unrelated either to the fact that one of the issuers of the securities (HBI) also happened to be Texas-based[9] or to anything that HH&R did, let alone anything that HH&R did in Texas.[10]

Although these state enforcement problems were outside the scope of HH&R's engagement,[11] by means of a telephone call from Los Angeles to New York HH&R promptly alerted Mr. Lopes to the

---

8 Hutton originally registered $1 million of the HBP securities for sale in Texas. The very last sentence of the text of the blue sky memorandum cautioned Hutton not to sell more securities than it had registered. (FST 1509.)

9 HBP was located in New York City until April 1988. (Kanofsky Aff. ¶ 7, FST 23.) Shearson disputed the trial court's finding in this regard but has never cited any evidence to the contrary. In the trial court Shearson submitted an affidavit to the effect that HBP is now located in Texas. In any case, since Shearson and not HBP was the plaintiff here, it is irrelevant where HBP is located.

10 HH&R was no more subject to personal jurisdiction in Texas than it would have been in Indiana, Arizona, Massachusetts or Tennessee.

11 Shearson disputed the scope of HH&R's engagement but offered no evidence in support. As discussed below, the scope of HH&R's engagement did not affect the jurisdictional issue because no HH&R act or omission that Shearson challenged took place in Texas.

problems in early June 1988 and suggested that Shearson might be able to cure the Texas oversale problem by paying the ordinary registration fee for the excess units that it had sold plus a penalty.[12/] (Kanofsky Aff. ¶¶ 7-8, FST 23.) Mr. Lopes said he would look into the various problems and get back to HH&R. (Kanofsky Aff. ¶ 8, at FST 23.) In June and July, HH&R made follow-up calls from Los Angeles to Shearson in New York City (getting through only once) and sent a follow-up letter from Los Angeles to Shearson in New York in mid-July. (Kanofsky Aff ¶ 8, at FST 23.) Shearson, however, apparently took no action to attempt to cure the oversale until the statutory procedure for cure, arguably as a matter of right (*i.e.*, without obtaining regulatory permission), expired on July 23, 1988, a month and a half after HH&R's first notice.[13/] On July 28, 1988, in a telephone conversation between a Shearson employee in New York City and HH&R in Los Angeles, Shearson for the first time directed HH&R to investigate and take charge of the problems. (Kanofsky Aff. ¶ 9, at FST 23.) By then, any automatic right under the statute to pay additional registration fees and penalties and thereby to seek a cure of the oversale had already expired. (Kanofsky Aff. ¶ 19, at FST 23.)[14/]

---

12 By way of amendment to its original state court petition, Shearson cobbled together a claim that HBP could have been made to pay the penalty portion of the fee, even though the fault was entirely that of Hutton/Shearson, if only HH&R had presented a demand by its one joint client (Shearson) against its other joint client (HBP) with enough force and that HH&R's position as to the appropriate splitting of the fee was in breach of its fiduciary duty. As with all of Shearson's claims, whatever HH&R did or did not do in this regard occurred within California or in communications passing between New York and California and did not support jurisdiction in Texas.

13 Although Shearson's in-house counsel working on the matter (Jonathan Baum) apparently was aware of the deadline from prior dealings in Texas, HH&R was not. (Kanofsky Aff. ¶¶ 8-9, at FST 23.)

14 Shearson contended that when HH&R informed Shearson about the oversale problem seven weeks before the statutory cure date expired, it should have told Shearson when the allegedly automatic cure date expired. Shearson also suggested that HH&R erred in 1987 at the outset of the offering by not telling Shearson of the consequences of a prospective

(Footnote continued on next page)

Subsequently, the Texas Securities Commissioner apparently took the position that because it was not possible to identify which of the securities sold in Texas were registered and which were not, all of the sold securities should be treated as unregistered and Shearson should offer rescission to all Texas purchasers. The offering itself and all related offering materials had been approved by the Texas regulators in advance of the offering; Shearson's sale of more securities than had been registered thus was a far cry from the usual sale of unregistered securities, *i.e.,* securities that have never been registered or subjected to regulatory review at all. Nevertheless, for its own reasons, and without seeking or purporting to rely on legal advice from HH&R, Shearson complied with the regulators' request and elected to give investors three years in which to opt to rescind. Shearson thus eventually refunded more than $5 million to Texas investors who chose to rescind their purchases, receiving the investors' HBP units in return.

3. Shearson's Misstatement of the Record

Shearson has repeatedly made assertions in its Petition that the record does not support. By way of example, we address some of the more egregious immediately below.

a) The Scope Of HH&R's Engagement

Shearson claims that in addition to handling initial registration of the securities in the various states and subsequently filing final sales reports for the purpose of apprising regulators of how many units had been sold, HH&R was to handle "all aspects of the Houston Biotech offering," Petition at 4, including the correction of any regulatory problems that might arise. In the Texas courts,

---

(..continued)

oversale, if one occurred. Shearson now disingenuously claims that "something went horribly wrong in Texas," Petition at 3, but neglects to mention that the problem was of its own making after the completion of the registration process for which it engaged HH&R: Shearson does not deny that it was fully informed by HH&R about the number of units that were registered for sale in Texas or that it sold substantially more than the amount registered.

Shearson relied in support of this proposition on FST 1688-89, 424, and 1715.

The first citation is to the testimony of an HH&R paralegal who said that after she received information from Shearson about the number of securities actually sold in each state, and in connection with her preparation of final sales reports, she compared those figures with the amount registered for sale in each state so that she could let an attorney know if there were any problems. In this instance, she noted the oversale in Texas and reported that fact to an HH&R attorney. See FST 1689. Nothing in her testimony remotely supports the existence of the sweeping obligation alleged by Shearson.

FST 424 is testimony from Mr. Kanofsky that HH&R worked on the HBP offering, negotiated related contracts, and did some work subsequent to the offering. Again, nothing in his cited testimony remotely supports Shearson's global assertion that HH&R was to take all necessary corrective action if there were any problems. Indeed, when regulatory-enforcement problems arose at the outset of the offering, Shearson looked to Texas and other New York securities counsel (not HH&R) for advice. (FST 21.)

The final citation, FST 1715, is additional testimony from the HH&R paralegal that part of her job was to make sure that where particular states required the filing of sales reports after the close of an offering, the reports were timely filed. Contrary to Shearson's assertions, after completing the registration forms, HH&R had no role or duty at all during the offering period itself.

This is the record evidence on which Shearson bases its assertions about the scope of HH&R's engagement. Because the evidentiary record is not before the Court at this juncture and Shearson's brief is bereft of record citations, it should be incumbent on petitioning counsel to be scrupulously accurate about what the record shows.[15]

---

[15] Shearson later implies (Petition at 12) that HH&R was engaged to provide advice regarding Texas laws and regulations. The record shows without contradiction that not only did HH&R expressly disclaim such expertise, but when Shearson/Hutton wished to obtain advice about Texas laws and regulations, it turned to its Texas counsel. (FST 21.)

b) HH&R's Role In Shearson's Decision About How Many Securities To Register For Sale In Texas

Shearson implies that HH&R decided how many units to register in Texas and that it did so "despite its knowledge that Texas sales would far exceed that amount." Petition at 4. What the record in fact shows is this:

Near the outset of the registration process, a Shearson employee in New York named Beth Weaver phoned an HH&R paralegal in Los Angeles named Mary Hood to tell her the number of securities to register for sale in Texas and elsewhere (FST 1240, 1248-49); Ms. Hood told Ms. Weaver (quite accurately) that Texas had no maximum registration fee (FST 1251) and would not refund registration fees even if regulators rejected the application for registration (FST 1251);[16] and Ms. Hood further suggested that Shearson "register as much as possible, depending on how much you want to pay as a filing fee" (FST 1251), bearing in mind that if the Texas regulators approved the registration, Shearson could amend its filing and increase the amount registered (FST 1252). Ms. Weaver then told Ms. Hood to register $1 million of securities in Texas. (FST 1252.) Ms. Hood in turn told Ms. Weaver in writing to advise HH&R as soon as possible if it wished to increase the registration in any state. (FST 1257.)[17]

Shearson, not HH&R, chose the amount to register in Texas. There is no evidence anywhere in the record that HH&R knew that

---

16 At the time of this conversation, there was a risk that Texas regulators would not approve the HBP offering for sale in Texas -- at least in part because of a regulatory violation Hutton had recently committed in the state. (FST 1242, 1245.) If the regulators had in fact refused to approve the offering for sale, any registration fees paid at the time of application would have been forfeited.

17 In her testimony, Ms. Hood was explicit that she did not advise Ms. Weaver to await the completion of the offering to amend the Texas registration: "I didn't leave her with the impression that she should wait until she knew how much was sold and then register. I left her with the impression that if we get registered, we can then increase it should you need to increase the amount." (FST 1244.)

the actual sales in Texas would "far exceed that amount." In any event, Shearson knew, because HH&R had told it, that it would need to amend the registration if the offering was approved for sale in Texas and sales would exceed the amount initially registered. It is also undisputed that HH&R had nothing to do with selling the securities, had no way of knowing how many securities were actually sold, apart from whatever information Shearson reported to it, and was not informed of state-by-state sales until May 1988, after Shearson closed the offering after more than nine months of sales activity. (FST 22, 1751, 1759, 1772.) It is also undisputed that Shearson knew how many units were registered for sale in each state (FST 1751) and how many units it was actually selling. As the Texas Court of Appeals correctly concluded, Shearson was solely responsible for selling more than the amount it had registered in Texas.

Shearson never disputed that what Ms. Hood told Ms. Weaver was accurate. Its complaint was that Ms. Hood should have gone further and explained to Ms. Weaver the consequences that could befall Shearson if it failed to follow HH&R's advice to amend the registration before selling more than it initially registered. Apart from the unusual nature of the duty Shearson seeks to impose (i.e., a lawyer or paralegal must not only give a client advice when requested but also must advise of all consequences should the client unilaterally refuse to follow that advice, even when the client has given no indication that it will not follow the advice), the complaint was that a California-based paralegal of a New York law firm failed to volunteer legal advice in a phone call with a client in New York.

(c) Shearson's Failure To Amend The Registration

Shearson concedes that once HH&R learned of Shearson's oversale of HBP securities in Texas, HH&R timely advised Shearson to cure the problem by amending the registration and paying an additional filing fee. Petition at 5. Of course, Shearson failed to do this and tried to lay the blame for its own negligence at HH&R's door. Shearson claims that it "directed HH&R to instruct Houston Biotech to pay the additional registration fee" and that HH&R "totally ignored that instruction and advised Houston Biotech (at its office in Houston) to pay only the non-penalty portion of the required fee amount . . . ." Petition at 6. When it made these

identical assertions in the Texas courts, Shearson cited to FST 457 and 527-30.

Putting to one side the fact that, even if true, this allegation would provide no basis for personal jurisdiction over HH&R in Texas, it is a mischaracterization of the record. FST 457 is an excerpt from Mr. Kanofsky's deposition testimony about a telephone conversation he had from Los Angeles with Mr. Lopes, one of the Shearson employees in New York:

> I remember him suggesting to me that we call up the partnership and tell them to give us a check or to pay. Otherwise the filing fees in Texas, I remember telling him that I thought that the -- although I hadn't spoken to representatives of the partnership, that based on my knowledge of their overall viewpoints, that they would take the view that they would be willing to pay the normal registration fee but that it would be up to Shearson, Hutton to pay the excess portion, the penalty portion, of the filing fee. And I told him I would check with them on that.
>
> I also -- we ended our call by him saying that he would look into the various matters that we discussed and get back to me.

(FST 457-58.) This is hardly evidence of a "direction" from Shearson to have HH&R "instruct" Houston Biotech to pay the registration fees.

FST 527-30 is additional testimony from Mr. Kanofsky about his subsequent telephone conversation with representatives of the HBP partnership. The most relevant portion is as follows:

> In the course of the conversation about the five problem states, I told him that I believe that the Texas problem may be able to be fixed by paying three times the normal filing fee and that I had -- that Mr. Lopes had suggested that that entire fee come from the partnership and that I had, in my prior conversation with Mr. Lopes told him that I would raise that with the partnership but that I expected that the answer

> of the partnership to be that they would not be willing to pay the penalty portion of the filing fee. And both Mr. Crary and Mr. Hutchins confirmed that that would be the view of the partnership.

(FST 528-29.) Again, this testimony hardly qualifies as evidence that HH&R "totally ignored" Shearson's "instructions" or that HH&R was "advising" the partnership to pay only the non-penalty portion of the fees. At most, it reflects only the entirely logical (and hardly sinister) objective view that because Shearson had caused the regulatory problem that gave rise to a penalty for overselling and failing to amend, one might expect that, as between HH&R's joint clients, Shearson should pay the penalty portion.[18/]

Mr. Kanofsky further testified that he asked another HH&R paralegal, Doreen Heywood, to call Lopes and relay the information that he had learned from the partnership, and that she told him she had done so. (FST 530, 644-45.) Mr. Kanofsky was also told by one of the HBP representatives that he, too, would call others at Shearson and "try to get Lopes moving." (FST 532, 540.) Mr. Kanofsky was later called by Ms. Weaver of Shearson, who explained that in fact "Shearson would pay the penalty portion of the fee and that Mr. Lopes would be the person to arrange to get it." (FST 555; see FST 554.)[19/] Of course, Shearson never paid the fee. By contrast to this evidence is Shearson's unsupported claim that HH&R "neglected to inform Shearson of Houston Biotech's refusal to pay the remedial portion of the fee." Petition at 6.

---

[18] In fact, Mr. Kanofsky's testimony does not indicate that he was giving advice or taking a position about which of HH&R's clients should pay what. In his conversation with Mr. Lopes, he made only a prediction about what HBP's position would be. In his conversation with HBP, he acted as a conduit for Shearson's request.

[19] Well after the deadline for amendment of the registration had expired, HH&R learned that despite what it had been told by Ms. Weaver of Shearson, Mr. Lopes apparently did not view it as his job to deal with the Texas oversale. (See FST 604-05.)

ARGUMENT

As Shearson concedes, the generally-applicable constitutional test for the exercise of personal jurisdiction over a nonresident defendant is well-settled. The nonresident defendant must have purposefully established "minimum contacts" with the forum state. *Burger King v. Rudzewicz*, 471 U.S. 462, 474 (1985). There must be a "substantial connection" between the nonresident defendant and the forum arising from action or conduct of the nonresident defendant purposefully directed toward the forum state. *Id.* at 475. When specific jurisdiction is asserted, the cause of action must "arise out of or relate to" those activities that the defendant has "purposefully directed" at residents of the forum. *Id.* at 472. When general jurisdiction is alleged, pursuant to which a court exercises jurisdiction over a suit that does not arise out of or relate to the nonresident defendant's contacts with the forum, there must be continuous and systematic contacts between the defendant and the forum. *Id.* at 473 n.15; *Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408, 414 n.9 (1984). Finally, the assertion of personal jurisdiction must comport with "fair play and substantial justice." *Burger King*, 471 U.S. at 476-77.

This Court has eschewed a "mechanical" application of this--or any--formulation of the constitutional test. *Burger King*, 471 U.S. at 478. Instead, the minimum contacts analysis has been refined by identifying recurring fact patterns and outlining guidelines for application of the due process test to these patterns.

Astoundingly, Shearson has not cited even one case involving the recurrent fact pattern of a malpractice claim against a nonresident attorney; instead it purports to rely on inapposite cases involving intentional torts and products liability. Shearson's failure to cite cases addressing an attorney's amenability to personal jurisdiction outside the state where he is licensed and where the challenged legal services were performed is because the guidelines for application of the due process test to these patterns that the cases on point establish demonstrate that there was no basis for jurisdiction over HH&R in Texas and thus no conflict in the decisions for this Court to consider under Rule 10(b) in deciding whether to hear this case. Shearson's suggestion that "national" law firms are amenable to personal jurisdiction in <u>every</u> state not only is

without support in the cases but is so far-fetched that no court has ever suggested that such a conclusion is even plausible.

The cases with which the decisions below are entirely consistent hold that there is no jurisdiction over a nonresident attorney where, as here, the challenged work was performed in the state in which he is licensed to practice rather than in the forum state. Requiring suit in the state where legal services were performed, especially where, as here, the countervailing policy of providing a local forum to a resident plaintiff does not apply, assures that the forum state will be the state that licensed the attorney and established the controlling standard of care against which the attorney's conduct must be measured. *See Myers v. Emery*, 697 S.W.2d 26, 32 (Tex. App. -- Dallas 1985, no writ) (Texas lacked jurisdiction over Oklahoma law firm hired to represent Texas defendant in Oklahoma lawsuit, despite firm's having made telephone calls and sent correspondence to its client in Texas in connection with litigation and despite firm's numerous other fortuitous contacts with Texas); *FDIC v. Malmo*, 939 F.2d 535, 537 (8th Cir. 1991) (Missouri lacked jurisdiction over California attorneys with respect to claim arising out of services performed in California even though attorneys solicited client in Missouri and even though "effects of defendant's conduct (*i.e.*, injury to the client) were intended to, and did occur in Missouri"); *Austin Co. v. Pennie & Edmonds*, 823 F.2d 223, 226-27 (8th Cir. 1987) (no jurisdiction in South Dakota over South Dakota client's malpractice action against New York law firm despite firm's trip to South Dakota to review documents and numerous communications by telephone, mail and courier between New York and South Dakota); *Mayes v. Leipziger*, 674 F.2d 178 (2d Cir. 1982) (no jurisdiction in New York over California lawyer hired by New York client to handle litigation in California); *Smith v. Morris & Manning*, 647 F. Supp. 101, 104 (S.D.N.Y. 1986) (Georgia law firm not amenable to jurisdiction in New York with respect to claim by New York client regarding estate-planning work done in Georgia despite numerous communications passing between Georgia and New York); *Campbell v. Gaspar*, 102 F.R.D. 159, 162 (D. Nev. 1984) (no jurisdiction in Nevada over claim by Nevada client that California attorney committed malpractice in California; "Where personal services are involved, such as those of a professional person like a

doctor or lawyer, the place where the services were rendered is very important. In this regard, the rule is that use of the mails or telephone does not amount to purposeful activity, invoking the benefits and protections of the state on the receiving end of such communications."); *Stonecipher v. Sexton*, 54 F.R.D. 435, 439-40 (D. Kan. 1972) (no jurisdiction in Kansas over malpractice claim by Kansas client against Arizona law firm for negligent handling of Illinois litigation). *See generally Credit Lyonnais Bank Nederland, N.V. v. Manatt, Phelps, Rothenberg & Tunney*, 202 Cal. App. 3d 1424, 1437, 249 Cal. Rptr. 559 (1988) (foreign lawyer's alleged malpractice with respect to California real-estate transactions and dealings with local counsel must be adjudicated in jurisdiction that licensed lawyer).

Stripped of its rhetoric, Shearson's position is that a nonresident attorney who gives incorrect legal advice (or, as in this case, allegedly fails to give complete advice) about the law of the forum state is amenable to a malpractice suit in that state, even when the client was not a resident of the forum either. Shearson's position is without support in law or in reason. We are unaware of a single reported instance where a court exercised jurisdiction over an attorney in a forum that was neither where the attorney was licensed to practice, where the work complained of took place, nor where the plaintiff/client resided. The Texas courts properly held that this should not be the first such case.

Faced with the fact-specific nature of the rulings below and the total absence of even a claimed conflict between those rulings and any other published decision, Shearson can point to no reason under Rule 10 why the Court should review this case. It argues that more and more nonresident companies like Shearson will turn to nonresident lawyers for advice about Texas law, and that Texas should have a strong interest in regulating the conduct of such lawyers. Petition at 11-12. At least insofar as the argument bears on personal jurisdiction, the three Texas courts below obviously disagreed.

Whether or not Shearson's premise is factually correct (and there is no reason to think it is), the conclusion hardly follows. While Texas certainly has an interest in regulating the practice of law in Texas, it has no interest in regulating the practice of law in

California or New York, particularly where the client claiming injury is not a Texas resident. Certainly, Shearson fails to offer any policy reason why Texas must make its busy courtrooms available to nonresident plaintiffs suing nonresident lawyers simply because the claim is based on incomplete advice given elsewhere about Texas law.

Shearson also says that unless the Texas Court of Appeals is reversed, "HHR, which caused the problem, will escape even an assessment of its responsibility" and will be "immune from Texas' jurisdiction for its breaches of the ethical rules governing the practice of law in Texas." Petition at 12. As to the first argument, the import of the Texas Court of Appeals' opinion is only that Shearson cannot sue HH&R in Texas, not that HH&R is immune from suit anywhere. As to the second argument, while Shearson seeks to create the implication that HH&R attorneys in California were guilty of violating Texas ethical rules of conduct, it provides no support for such an unlikely claim. Moreover, it is absurd to suggest that a nonresident lawyer must be licensed to practice law in Texas, and must be made subject to disciplinary action in Texas before he or she can advise a nonresident client about Texas law or prepare application forms to be transmitted to a Texas regulatory agency by the client's Texas counsel. That would mean that every issuer and underwriter would require at least 50 sets of counsel in a nationwide offering.

Finally, Shearson makes a thinly veiled appeal to protectionism, suggesting, on the one hand, that Texas courts should have intervened to preserve the integrity of Texas law since it was the subject of advice by non-Texas lawyers and, on the other hand, that courts in the state where the lawyers are licensed should not be trusted to determine whether such lawyers acted appropriately. That kind of provincial appeal is no part of the constitutional test for *in personam* jurisdiction. Fortunately, the Texas courts rejected this illogical and insulting parochialism, which would only have given Texas and its lawyers a bad name, leaving nothing for this Court to review.

As shown above, HH&R was not subject to personal jurisdiction in Texas because it did not have the requisite "minimum contacts" and Shearson's claims did not arise from or relate to such

contacts as did exist. But even if the facts were otherwise, HH&R still would not have been subject to personal jurisdiction in Texas because, as the trial court found, the exercise of jurisdiction over it would not have comported with "fair play and substantial justice." *Burger King*, 471 U.S. at 476-77.[20] Shearson has not addressed this point in its Petition, but it would provide an independent ground for denial of the Petition.

PRAYER

Shearson's Petition should be denied.

Respectfully submitted,

Parker C. Folse, III
SUSMAN GODFREY, L.L.P.

Washington Mutual Tower
1201 Third Avenue, Suite 3120
Seattle, Washington 98101
Telephone: (206) 516-3880
Telecopy: (206) 516-3883

5100 First Interstate Bank Plaza
1000 Louisiana Street
Houston, Texas 77002-5096
Telephone (713) 651-9366
Telecopy (713) 653-7897

ATTORNEYS FOR RESPONDENT
HUGHES HUBBARD & REED

---

[20] The Texas Court of Appeals did not reach this issue because it agreed that jurisdiction could not be sustained either under the doctrine of general jurisdiction or under the doctrine of specific jurisdiction. However, the trial court did reach the issue and resolved it in HH&R's favor.

APPENDIX

NO. 91-038067

SHEARSON LEHMAN BROTHERS INC. f/k/a SHEARSON LEHMAN HUTTON, INC. and SHEARSON LEHMAN BROTHERS HOLDINGS, INC. f/k/a SHEARSON LEHMAN HUTTON HOLDINGS, INC.	§	IN THE DISTRICT COURT OF
Plaintiffs,	§	HARRIS COUNTY TEXAS
v.	§	
HUGHES HUBBARD & REED	§	
Defendant.	§	152ND JUDICIAL DISTRICT

[PROPOSED] FINDINGS OF FACT AND CONCLUSIONS OF LAW GRANTING SPECIAL APPEARANCE

In accordance with the Court of Appeals' order entered on December 9, 1992, the Court makes the following findings of fact and conclusions of law in support of its order entered on September 16, 1992, granting defendant's special appearance and dismissing this action for want of personal jurisdiction over defendant.

FINDINGS OF FACT

1. Defendant Hughes Hubbard & Reed ("HH&R") is a New York partnership with its principal place of business in New York City and other offices in Los Angeles, California; Washington, D.C.; Miami, Florida; and Paris, France. HH&R is in the business of providing legal services.

2. HH&R has no office or employee in Texas, and no HH&R lawyer is a member of the Texas bar. HH&R does not have continuous or systematic contacts with Texas and does not engage in substantial activities in Texas.

3. Plaintiffs Shearson Lehman Brothers, Inc., formerly known as Shearson Lehman Hutton, Inc., and Shearson Lehman

Brothers Holdings, Inc., formerly known as Shearson Lehman Hutton Holdings, Inc. together with their predecessor in interest E.F.Hutton & Co. Inc. (collectively, "Hutton/Shearson") are an investment-banking firm with their principal place of business in New York City.

4. In December 1986, Hutton/Shearson retained the Los Angeles office of HH&R in connection with a proposed national offering of units of limited partnership interest in Houston Biotech Partners, L.P. ("HBP"), a research and development limited partnership to be formed to finance work to be performed by Houston Biotechnology Inc. ("HBI"). HBP's only office was in New York City until April 1988. HH&R acted as counsel in connection with the formation of HBP, the negotiation and documentation of agreements to which HBP would be a party and the registration with the Securities and Exchange Commission and 44 state's securities regulators of the securities to be sold by Hutton/Shearson to the investing public. The Hutton/Shearson employees involved in this work were based in either New York or California. Various law firms besides HH&R, including Vinson & Elkins in Texas, were responsible for clearing the proposed offering locally, using insofar as possible the uniform materials that HH&R prepared for federal and state registration purposes. HH&R informed Hutton/Shearson that it did not purport to be expert in the state law of any state other than California.

5. In general, when state "blue sky" enforcement problems had arisen in the past in Texas and elsewhere on other offerings, Hutton/Shearson retained local expert counsel to deal with them. In connection with the HBP offering, Hutton/Shearson retained its usual Texas regulatory expert counsel, Johnson & Gibbs in Austin, to handle problems created by its having violated the Texas "blue sky" laws by offering HBP securities to a large number of people before the Texas registration became effective on July 23, 1987. Hutton/Shearson also retained a New York law firm other than HH&R to represent it before the Securities and Exchange Commission with respect to the potential federal consequences of the unlawful Texas offers.

6. HH&R successfully completed its federal and state registration work in connection with the HBP offering by September

1987. Virtually all of the work was done by HH&R in Los Angeles, although HH&R lawyers from Los Angeles made two trips to Texas, once in early 1987 for due diligence purposes and once in July 1987 to supervise the printing of the offering materials. Hutton/Shearson does not allege that HH&R's due diligence was faulty or that there was any error in the printed offering materials. Hutton/Shearson's claims do not arise out of HH&R's limited contacts with Texas in connection with the HBP offering.

7. Hutton/Shearson terminated the HBP offering in April 1988. So that HH&R could perform the ministerial task of filing post-offering sales reports as required by various states' securities regulators, a Hutton/Shearson employee in New York supplied sales data to HH&R in Los Angeles in late May 1988. In the course of preparing the sales reports, an HH&R paralegal in Los angeles noticed that Hutton/Shearson appeared to have sold securities in Tennessee, Massachusetts and Arizona, where the HBP offering had not been registered for sale, and to have sold more securities in Texas and Indiana than it had registered for sale in those states. In early June 1988, an HH&R associate in Los Angeles telephoned the Hutton/Shearson employee in New York who had supplied the sales data and notified him of the problems that apparently had arisen in these five states. With respect to Texas, the associate indicated that he thought that it might be possible to cure the problem by retroactively amending the Texas registration papers and paying a fee including a penalty. The Hutton/Shearson employee in New York responded that he would look into the problem and get back to the associate. A follow-up telephone call was made from Los Angeles to New York on June 29, 1988, and a follow-up letter was sent from Los Angeles to New York on July 18, 1988.

8. On July 28, 1988, another Hutton/Shearson employee in New York telephoned the HH&R associate in Los Angeles to engage HH&R to represent Hutton/Shearson with respect to the five state regulatory matters first pointed out in early June 1988. The time to request permission for retroactive amendment of the securities registration in Texas pursuant to a provision in the Texas "blue-sky" law had expired five days earlier, and Hutton/Shearson had by then taken no action. HH&R was unaware of any deadline for taking action in Texas. Hutton/Shearson subsequently granted

all Texas purchasers three-year options to rescind their purchases and ultimately refunded in excess of $5 million in the process.

9. The only time that any HH&R representative was in Texas with respect to the Texas oversale problem was after the fact on September 14, 1988, when Hutton/Shearson summoned two HH&R lawyers from Los Angeles to Houston to explain what they knew about the problem. Hutton/Shearson's claims against HH&R do not arise out of this meeting or indeed out of any contact between HH&R and Texas.

10. Hutton/Shearson's claims arise out of work done by HH&R in Los Angeles and telephone and written communications passing between HH&R in Los Angeles and Hutton/Shearson in New York.

11. That one of Hutton/Shearson's regulatory problems involved Texas law fortuitously depended entirely on where Hutton/Shearson actually sold HBP securities, a process in which HH&R was not involved, and had nothing to do with HBI's presence in the state.

12. In connection with the oversale problem, HH&R did not purposefully establish contacts with Texas, direct its activities at Texas residents or avail itself of either the privilege of conducting activities in Texas or the benefit of Texas law. HH&R did not intentionally cause any effect in Texas.

13. HH&R could not reasonably anticipate being haled into a Texas court on account of any of its acts or omissions relating to the oversale problem.

14. It would not be reasonable for the Court to assert personal jurisdiction over HH&R in this action.

15. In substance, this is a case of a New York client complaining that the Los Angeles office of a New York law firm gave incomplete advice about an issue of Texas law. It can more appropriately be resolved in another forum.

16. To the extent that any of the foregoing findings of fact are in whole or in part deemed to be conclusions of law, the Court also so concludes as a matter of law.

CONCLUSIONS OF LAW

1. Texas extends personal jurisdiction to the full limits of the United States Constitution.

2. The personal jurisdiction test to be applied appears in Guardian Royal Exchange Assurance, Ltd. v. English China Clays, P.L.C., 815 S.W.2d 223, 230 (Tex. 1991) (footnotes omitted):

> First, the nonresident defendant must have purposefully established "minimum contacts" with Texas. There must be a "substantial connection" between the nonresident defendant and Texas arising from action or conduct of the nonresident defendant purposefully directed towards Texas. When specific jurisdiction is asserted, the cause of action must arise out of or relate to the nonresident defendant's contacts with Texas. When general jurisdiction is alleged, there must be continuous and systematic contacts between the nonresident defendant and Texas. General jurisdiction requires a showing of substantial activities by the nonresident defendant in Texas.

This test is not to be applied mechanically.

3. HH&R has negatived both kinds of personal jurisdiction here.

4. Under the facts found above, HH&R did not have "minimum contacts" with Texas and exercise of personal jurisdiction over HH&R in this action also would not comport with traditional notions of fair play and substantial justice.

5. An attorney who gives advice about the law of a state other than where he practices does not thereby automatically subject himself to the personal jurisdiction of the other state. Particularly this is true where the plaintiff is not himself a resident of the other state. HH&R is no more subject to personal jurisdiction in Texas for the matters at issue in this action that it would have been in Tennessee, Massachusetts, Arizona or Indiana, the other states in

which Hutton/Shearson encountered regulatory problems as a result of its unauthorized sales of HBP securities.

6. To the extent that any of these conclusions of law are in whole or in part deemed to be findings of fact, the Court also so finds.

SIGNED this 16th day of December, 1992.

/s/

The Honorable Jack O'Neill
District Judge